

In the Matter of the Application of)
HAWAIIAN ELECTRIC COMPANY, INC.)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
MAUI ELECTRIC COMPANY, LIMITED)
For Approval of a Master Agreement)
for Facility Attachments Between)
Hawaiian Electric Company, Inc. and)
Time Warner Telecom of Hawaii, L.P.)

DECISION AND ORDER NO. 22351

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF IOWA

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Karen Higzel.
Chief Clerk of the Commission

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KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Commission, State of Ha
R. Higuel

OF THE STATE OF HAWAII

In the Matter of the Application of)
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For Approval of a Master Agreement)
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Docket No. 05-0331

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DECISION AND ORDER

By this Decision and Order, the commission approves the Master Agreement for Facility Attachments, dated December 28, 2005, between HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), MAUI ELECTRIC COMPANY, LIMITED ("MECO") (collectively, "Applicants"), and Time Warner Telecom of Hawaii, L.P. ("Time Warner").

I.

Background

HECO, HELCO, and MECO are the franchised providers of electric utility service for the islands of Oahu and Hawaii and the County of Maui, respectively. Time Warner is a competitive provider of telecommunications services in the State of Hawaii ("State").¹

¹See In re Time Warner Comm. of Hawaii, L.P., dba Oceanic Comm., Docket Nos. 94-0093, 94-0265, and 95-0316. See also

A.

Master Agreement

Applicants and Time Warner have entered into a Master Agreement for Facility Attachments, dated December 28, 2005 (the "Master Agreement").

The Master Agreement sets forth the terms and conditions for granting Time Warner non-exclusive licenses to attach wireline communications equipment to all real and personal property owned or controlled by Applicants, including without limitation, poles, towers, and other structures for the purpose of providing competitive telecommunications services within the State.² Time Warner shall use Applicants' facilities only for the purpose of installing, removing, replacing, maintaining, and operating, at its expense, wireline communications equipment.

The term of the Master Agreement is ten (10) years, commencing December 28, 2005, subject to an additional ten (10)-year extension upon the agreement of the contracting parties.

Time Warner may not commence the installation of its wireline communications equipment without first obtaining a license to utilize Applicants' poles. For each request to attach to Applicants' poles, Applicant will grant Time Warner a non-exclusive license in the form of a Facility License Agreement

In re Time Warner Comm. of Hawaii, L.P., dba Oceanic Comm.,
Docket No. 05-0329.

²The Master Agreement does not apply to Applicants' underground facilities. A separate agreement or amendment to the Master Agreement will be negotiated by Applicants and Time Warner if in the future Time Warner seeks the use of Applicants' underground facilities.

("License").³ The License fee for each pole attachment will be based on a negotiated per-pole-foot rate, with annual increases indexed to the Consumer Price Index for the Metropolitan Statistical Area of Honolulu. In addition, Time Warner will be responsible for the payment of all applicable taxes, "so that [Applicants] receive[] the full base license fee."⁴

The term of each License is for five (5) years from the date of commencement of the License, and may be extended for additional five (5)-year periods if agreed to by Applicants and Time Warner. Either contracting party may terminate a License upon sixty (60) days notice to the other party. In addition, if Time Warner defaults on any of its obligations under a License and fails to correct the defaults within thirty (30) days after written notice, Applicants may immediately terminate the License.

The Agreement is subject to all government and regulatory approvals, including the commission's approval, pursuant to Section 23(e) of the Master Agreement.

B.

Procedural Background

Applicants request the commission's approval of the Master Agreement, by Application filed on December 30, 2005.⁵

³Exhibit A of the Master Agreement.

⁴Master Agreement, Section 6(b).

⁵Application, Exhibit I, and Certificate of Service, filed on December 30, 2005 (collectively, the "Application"). A copy of the Master Agreement is attached as Exhibit I to the Application. Applicants served copies of their Application upon

Applicants make their request pursuant to Hawaii Revised Statutes ("HRS") § 269-19, Hawaii Administrative Rules ("HAR") § 6-80-78(a), and Section 23(e) of the Master Agreement. On March 15, 2006, the Consumer Advocate filed its Statement of Position, stating that it does not object to the commission's approval of the Master Agreement.

II.

Discussion

HRS § 269-19 provides in respective part that "[n]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the public utilities commission an order authorizing it so to do. Every such sale, lease, assignment . . . [or] disposition . . . made other than in accordance with the order of the commission shall be void." The purpose of HRS § 269-19 is to safeguard the public interest. In re Honolulu Rapid Transit Co., Ltd., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

HAR § 6-80-78 states in pertinent part:

Approval of agreement by the commission. (a) All agreements concerning access to poles, ducts, conduits, and rights-of-way adopted by negotiation . . . must be submitted to the commission for review and approval. .

. . .

the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate").

(b) The commission shall approve or reject the agreement, with written findings as to any deficiencies. The commission may only reject:

(1) An agreement, or any portion of the agreement, adopted by negotiation if it finds that:

(A) The agreement, or any portion of the agreement, discriminates against a telecommunications carrier not a party to the agreement; or

(B) The implementation of the agreement, or any portion of the agreement, is not consistent with the public interest, convenience, and necessity[.]

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(c) The commission shall approve or reject the agreement within ninety days after submission by a party of an agreement adopted voluntarily by negotiation If the commission fails to act within the prescribed time period, the agreement is deemed approved.

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HAR § 6-80-78.

Section 23(e) of the Master Agreement states in respective part that the "Master Agreement is subject to any and all required governmental, regulatory and other approvals, including, without limitation, those of the Hawaii Public Utilities Commission."

Applicants assert that the Master Agreement is consistent with the public interest:

1. The use of Applicants' poles will allow Time Warner to provide telecommunications services to its customers.

2. Applicant will receive revenues from Time Warner, to the ratepayers' benefit.

3. The Master Agreement will not interfere in any way with Applicants' abilities to provide electric utility service to the public. Applicants make no representations concerning the

conditions of its facilities, and Time Warner accepts and assumes all risks with respect to the use of Applicants' facilities and the conditions thereof. Time Warner, upon notice by Applicants, must promptly remediate or remove at its expense any interference with Applicants' operations.

4. Time Warner will be allowed to attach its wireline communications equipment to Applicants' poles only after the contracting parties execute a License. Moreover, Time Warner's installation of its wireline communications equipment: (A) shall comply with all applicable laws, rules, order, and standards adopted or recommended by any governmental agency having jurisdiction over Time Warner's use and occupation of the licensed poles, including standards governing construction and maintenance; (B) shall be completed by contractors approved by Applicants, and in accordance with engineering plans and construction schedules approved by Applicant; and (C) will be paid for by Time Warner. Time Warner is also required to maintain its wireline communications equipment in "good repair" condition.⁶

5. The Master Agreement: (A) requires Time Warner to procure and maintain specified minimum levels of insurance (workers' compensation, temporary disability, employers' liability, commercial general liability, motor vehicle, and property), with Applicants named as the primary insured; and

⁶Master Agreement, Section 7(a).

(B) in general, includes indemnification, duty to defend, and hold harmless requirements in Applicants' favor.⁷

Based on its review of the Master Agreement, the Consumer Advocate finds that:

1. The Master Agreement "is akin to a pole attachment agreement, as opposed to an agreement that allows the telecommunications carrier to attach equipment on equipment at Applicants' substations."⁸

2. There are no terms that will negatively affect Applicants' performance of its duties to the public as regulated utilities, or interfere in any way with Applicants' abilities to provide electric utility service to their customers.

3. There are no terms that will discriminate against any telecommunications carrier that is not a party to the Master Agreement. In fact, the terms of the Master Agreement are similar to other commission-approved pole attachment agreements.⁹

⁷Concomitantly, the contracting parties "shall each be responsible for and shall defend, indemnify and hold harmless the other party and the other party's directors, officers, employees, agents, successors and assigns, from and against any loss, damage, cost, expense or liability to the extent directly or indirectly arising out of or attributable to the release, threatened release, discharge, or disposal of Hazardous Materials caused by the indemnifying party on, under or about the licensed facilities[.]" Master Agreement, Section 16(e).

⁸Consumer Advocate's Statement of Position, at 2 n.1.

⁹The Consumer Advocate cites to In re Verizon Hawaii Inc., Docket No. 04-0045, Decision and Order No. 20903, filed on April 14, 2004 (Pole Attachment and Conduit Occupancy Licensing Agreement between Verizon Hawaii Inc. and Time Warner); In re Verizon Hawaii Inc., Docket No. 02-0414, Decision and Order No. 20023, filed on February 18, 2003 (Amendment No. 2, Pole Attachment and Conduit Occupancy Licensing Agreement between Verizon Hawaii Inc. and Pacific LightNet, Inc.); In re Hawaiian Elec. Co., Inc., Docket No. 02-0166, Decision and

4. The license fee and associated fee development process: (A) were negotiated consistent with HAR § 6-80-75, and prior rulings by the commission and Federal Communications Commission; and (B) are reasonable.

5. Revenues from the Master Agreement will benefit Applicants' ratepayers. Moreover, the Master Agreement will enable Time Warner to continue its provision of competitive telecommunications services in the State, and will reduce the number of poles and costs that would be necessary in the absence of the Master Agreement. Hence, the Master Agreement is consistent with the public interest.

The commission finds that: (1) the Master Agreement does not appear to discriminate against other telecommunications carriers; and (2) the implementation of the Master Agreement is consistent with the public interest, convenience, and necessity. Of particular note: (1) Applicants represent that the Master Agreement will not interfere in any way with Applicants' abilities to provide electric utility service to the public; and (2) the Master Agreement will enable Time Warner to attach its wireline communications equipment to Applicants' poles, consistent with recognized construction and maintenance standards, thereby further promoting competition in the State's telecommunications market. Accordingly, the commission approves

Order No. 19719, filed on October 22, 2002 (Pole Attachment Agreement between HECO and AT&T Corp.); In re Verizon Hawaii Inc., Docket No. 02-0116, Decision and Order No. 19491, filed on July 30, 2002 (Pole Attachment and Conduit Occupancy Licensing Agreement, as amended, between Verizon Hawaii Inc. and Pacific LightNet, Inc.); and In re Hawaiian Elec. Co., Inc., Docket No. 96-0392 (Pole Attachment Agreement between HECO and AT&T Corp.).

the Master Agreement, pursuant to HRS § 269-19, HAR § 6-80-78, and Section 23(e) of the Master Agreement.

III.


Orders

THE COMMISSION ORDERS:

1. The Master Agreement between HECO, HELCO, MECO and Time Warner, dated December 28, 2005, is approved.
2. This docket is closed, unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii MAR 24 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:



Michael Azama
Commission Counsel

05-0331.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22351 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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For HECO, HELCO, and MECO

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For HECO, HELCO, and MECO



Karen Higashi

DATED: MAR 24 2006